

**OPEN RECORDS AND MEETINGS OPINION  
2022-O-02**

DATE ISSUED: January 19, 2022

ISSUED TO: Hettinger Public School

**CITIZEN'S REQUEST FOR OPINION**

This office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Michael J. Geiermann asking whether Hettinger Public School Board violated N.D.C.C. §§ 44-04-20, 44-04-19.2, and 44-04-19, by improperly noticing an executive session, failing to properly describe the general subject matter and legal authority before entering an executive session, and holding an unauthorized executive session.

**FACTS PRESENTED**

The Hettinger Public School Board (Board) held a regular meeting on January 13, 2021.<sup>1</sup> At the meeting, the Board received a letter from the Hettinger Agriculture Education Advisory Board Committee<sup>2</sup> recommending that the Agriculture Education Program teaching position become full-time.<sup>3</sup> The Board passed a motion to “go into Executive Session with the authority of NDCC 44-04-19.1(9) to discuss

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<sup>1</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Att’y Gen.’s Office (Mar. 16, 2021).

<sup>2</sup> The North Dakota Department of Career and Technical Education requires Advisory Committees “to strengthen the Career and Technical Education (CTE) programs it serves. Each advisory committee is made up of individuals with experience and expertise in the occupational field(s) that the program serves who advise educators on the design, development, implementation, evaluation, maintenance, and revision of Career and Technical Education (CTE) programs within a career pathway. The committee exists to advise, assist, support and advocate for career and technical education. It has no legislative, administrative or programmatic authority and is **advisory only**. Advisory Committees work cooperatively with school officials in planning and carrying out committee work.” Program Advisory Committee Guide (updated March 6, 2019), [https://www.cte.nd.gov/sites/www/files/documents/Budget%20%26%20Finance/State-Carl%20Perkins/Advisory\\_Committee\\_Guide.pdf](https://www.cte.nd.gov/sites/www/files/documents/Budget%20%26%20Finance/State-Carl%20Perkins/Advisory_Committee_Guide.pdf) (last visited January 18, 2022).

<sup>3</sup> Minutes, Sch. Bd., Hettinger Sch. Dist. (Jan. 13, 2021).

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negotiating strategy.”<sup>4</sup> The executive session was listed in the meeting agenda as “Negotiations of Contracts.”<sup>5</sup>

The executive session lasted approximately forty-one minutes. Superintendent Moser, Secondary Principal Seamands, Business Manager Ebert and Board members Andress, Kindsfater, Laufer, Christman, and Schmitz attended. After returning to the open part of the meeting, a motion was made and passed to “continue with the present Vocational Agriculture and Family Consumer Science Teacher position as the current position” and leave the “Vocational Agriculture and Family and Consumer Science as a combined teaching position.”<sup>6</sup> The Board denied Mr. Geiermann's request for a copy of the recording.<sup>7</sup> The meeting was recorded, and a copy was provided to this office.

### ISSUE

1. Whether the Board’s January 13, 2021, regular meeting notice described the general subject matter of the executive session in substantial compliance with N.D.C.C. § 44-04-20.
2. Whether the Board’s announcement before proceeding into executive session gave the public sufficient notice of the general subject matter of, and the legal authority for holding the executive session.
3. Whether the executive session was authorized by law and limited to the topics and legal authority announced during the open portion of the meeting.

### ANALYSIS

#### ISSUE 1

“Except as otherwise specifically provided by law, all meetings of a public entity must be open to the public.”<sup>8</sup> Public notice must be given in advance of all meetings of a public entity which should include the date, time, location of the meeting, topics to be considered, and the “general subject matter of any executive sessions expected

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<sup>4</sup> *Id.*

<sup>5</sup> Meeting Notice, Hettinger Pub. Sch. Bd. (Jan. 13, 2021).

<sup>6</sup> Minutes, Sch. Bd., Hettinger Sch. Dist. (Jan. 13, 2021).

<sup>7</sup> N.D.C.C. § 44-04-18(7) requires legal authority for denying an open records request to be given. Ms. Norby-Jahner provided Attorney General opinion citations supporting her position but failed to provide an explicit legal reason for denying Mr. Geiermann’s request.

<sup>8</sup> N.D.C.C. § 44-04-19.

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to be held during the meeting.”<sup>9</sup> The description of the “general subject matter” must be “sufficient to provide information about the topic or purpose of the executive session to a member of the public.”<sup>10</sup>

In a past opinion, I found that a notice which stated “Executive Session to Discuss Negotiations per NDCC 44-04-19.2” failed to “provide any information about the topic or purpose of the negotiations to a member of the public”<sup>11</sup> and thus failed to substantially comply with the notice requirements.<sup>12</sup> In other opinions, phrases such as “Collective Bargaining” and “Motion to go into Executive Session under NDCC 44-04-19.1” were also too vague to give the public sufficient information about the topic or purpose of the executive sessions.<sup>13</sup>

In support for its notice, the Board points to a 2009 opinion from this office in which a notice stating “Enter into Executive Session (NDCC 44-04-19.1) for discussions of Raging Rivers Water Park” was sufficient notice.<sup>14</sup> However, the notice in the 2009 opinion was more descriptive than the notice here because it included the subject of the executive session: Raging Rivers Water Park. Here, the notice only stated “Executive Session – Negotiations of Contracts,” with no description of what was being negotiated.

The January 13, 2021, meeting notice failed to provide any information to the public about the topic of the executive session. Therefore, it is my opinion that the Board’s notice failed to substantially comply with the open meeting laws by not identifying the general subject matter of the executive session and violated the notice requirements of N.D.C.C. § 44-04-20(2).

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<sup>9</sup> N.D.C.C. § 44-04-20(2).

<sup>10</sup> N.D.A.G. 2009-O-15; *see also* N.D.A.G. 2005-O-18; N.D.A.G. 2004-O-19; N.D.A.G. 2003-O-22.

<sup>11</sup> N.D.A.G. 2009-O-15.

<sup>12</sup> *Id.*

<sup>13</sup> N.D.A.G. 2004-O-13 (citing N.D.A.G. 2001-O-15); N.D.A.G. 2003-O-22. *See also* N.D.A.G. 2001-O-15 (Notice that stated, “employee relations” and “executive session” as separate agenda items failed to describe the subject matter of the executive session because the public would not understand the relationship between the items).

<sup>14</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Att’y Gen.’s Office (Mar. 16, 2021); N.D.A.G. 2009-O-09.

## ISSUE 2

“A governing body may hold an executive session to consider or discuss closed or confidential records.”<sup>15</sup> Before proceeding into an executive session, the governing body must announce during the open portion of the meeting both the topics it will be considering and the legal authority for holding the executive session on those topics.<sup>16</sup> A governing body is not required to reveal closed or confidential information, but must provide sufficient information about the topic and purpose of the executive session to keep the public apprised of the legally sufficient reason for holding the executive session.<sup>17</sup>

In a past opinion, the mere reference to “negotiations” did not give the public sufficient notice of the legal authority for holding an executive session.<sup>18</sup> An announcement to discuss “the conclusion of negotiations” was likewise insufficient because, although the word “negotiation” indicated which exemption in N.D.C.C. § 44-04-19.1 was being used, it failed to identify the particular contract or contracts under consideration.<sup>19</sup> Other opinions have said that a reference to a general “quitclaim action” failed to cite which specific action and topic would be discussed during the executive session,<sup>20</sup> and a citation only to N.D.C.C. § 44-04-19.1 failed to describe the subject matter of the executive session.<sup>21</sup> In order for phrases such as “negotiation strategy” or “negotiation instructions,” or similar language to be sufficient, the announcement must identify “the particular contract or contracts for which the governing body was discussing negotiation strategy or providing negotiation instructions under N.D.C.C. § 44-04-19.1(7).”<sup>22</sup>

The Board argues that its announcement was sufficient based upon a recent opinion to the Bismarck Public School (BPS) Board. In that opinion, the announcement did not include a specific description but instead stated the executive session was “regarding potential legal liability related to complaints raised to the district that

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<sup>15</sup> N.D.C.C. § 44-04-19.2(1).

<sup>16</sup> N.D.C.C. § 44-04-19.1(2)(b).

<sup>17</sup> N.D.A.G. 2015-O-13 (citing N.D.A.G. 2005-O-18); N.D.A.G. 2001-O-17.

<sup>18</sup> N.D.A.G. 2015-O-13 (citing N.D.A.G. 2005-O-18).

<sup>19</sup> N.D.A.G. 2003-O-22 (citing N.D.A.G. 2000-O-05). *See also* N.D.A.G. 99-O-04 (announcement of a closed session for “attorney consultation” is not sufficient if the announcement fails to identify the pending or reasonably predictable litigation to be discussed by the governing body).

<sup>20</sup> N.D.A.G. 2015-O-13.

<sup>21</sup> N.D.A.G. 2003-O-22.

<sup>22</sup> N.D.A.G. 2003-O-22 (citing N.D.A.G. 2001-O-17).

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could result in a reasonably predictable lawsuit or adversarial administrative proceeding.”<sup>23</sup> The Board had not violated the law with that announcement because complaints are confidential pursuant to N.D.C.C. § 15.1-07-25(2), so the BPS Board could not legally reveal any information within the complaints or discuss the complaints in the open portion of the meeting.<sup>24</sup> Here, the Board’s executive session was for contract negotiations and was not restricted by any statute that would make the subject of the contract negotiations confidential.

The Board also argues that the public understood what the executive session was about in the context of the entire meeting. In past opinions, this office has found certain announcements to be compliant with the law when taken in context of other agenda items when the public had enough information to understand the purpose of the executive session. Here, however, the letter from the advisory board did not give any context to the announcement to go into executive session for contract negotiations because the Board listed the letter on its agenda under New Business only as “Ag/FACS Position,” and received the letter in the public meeting so it did not appear necessary to continue the conversation in an executive session.<sup>25</sup>

Therefore, based upon the lack of any specific descriptions in its announcement, prior to the executive session, it is my opinion that the announcement was insufficient.

### ISSUE 3

A governing body may hold an executive session to discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator regarding pending or reasonably predictable litigation if allowing the other party to the negotiation, or members of the public, to listen to the discussion would result in increased costs to the public entity.<sup>26</sup> “The topics considered during the executive

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<sup>23</sup> N.D.A.G. 2020-O-02. Letter from KrisAnn Norby-Jahner, Att’y at Law, to Att’y Gen.’s Office (Mar. 16, 2021).

<sup>24</sup> N.D.A.G. 2020-O-02.

<sup>25</sup> *See* N.D.A.G. 2005-O-18 (citing *cf.* N.D.A.G. 2004-O-13 (discussion among the Board members which occurred after the legal authority was announced provided the public with notice that the topic of the executive session was to develop bargaining strategies for negotiating a contract for teacher compensation)); N.D.A.G. 2000-O-05 (had the executive session occurred immediately following a presentation by a member of the public, it might be fair to infer that the “negotiations” in the Board’s motion pertained to the topic presented).

<sup>26</sup> N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2015-O-10 (citing N.D.A.G. 2013-O-02; N.D.A.G. 2010-O-11; N.D.A.G. 2009-O-09; N.D.A.G. 2005-O-18).

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session are limited to those for which an executive session is authorized by law and that have been previously announced during the open part of the meeting.<sup>27</sup>

"A meeting may not be closed . . . simply because a contract is being discussed."<sup>28</sup> Additionally, a recap of negotiations generally may not be conducted in executive session.<sup>29</sup> Past opinions note that a negotiation strategy or instruction session may be closed only if allowing the other party to the negotiation to listen or learn of the discussion would result in increased costs to the public entity.<sup>30</sup> An executive session is not authorized for a governing body to receive an update or summary from its negotiator on the status of contract negotiations.<sup>31</sup> An executive session is permissible only if a governing body is discussing negotiating strategy or providing negotiating instructions.<sup>32</sup>

To properly hold a meeting for negotiation strategy, the public entity must meet three elements.<sup>33</sup> First, the public entity must discuss negotiating strategy or provide negotiating instructions to its attorney or other negotiator.<sup>34</sup> Second, there must be litigation, adversarial administrative proceedings, or contracts which are currently being negotiated or for which negotiation is reasonably likely to occur in the immediate future.<sup>35</sup> Third, a meeting may be closed under this subsection only if keeping the meeting open would have an adverse fiscal effect on the public entity's bargaining or litigating position.<sup>36</sup> If allowing the other party to the negotiation to listen to the discussion would result in increased costs to the public entity, a meeting may be closed.<sup>37</sup>

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<sup>27</sup> N.D.C.C. § 44-04-19.2(2)(d).

<sup>28</sup> N.D.A.G. 2000-O-05 (quoting N.D.A.G. 99-O-01).

<sup>29</sup> N.D.A.G. 2005-O-18 (citing N.D.A.G. 2000-O-05; *cf.* N.D.A.G. 99-O-04 (an update on the status of the situation and what had occurred up to that time should have occurred in the open portion of the meeting)).

<sup>30</sup> N.D.A.G. 2003-O-22 (citing N.D.A.G. 99-O-01).

<sup>31</sup> N.D.A.G. 2003-O-22 (citing N.D.A.G. 2000-O-05).

<sup>32</sup> *Id.*

<sup>33</sup> N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2013-O-11. *See also* N.D.A.G. 2004-O-24; N.D.A.G. 2000-O-09.

<sup>34</sup> N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2013-O-11.

<sup>35</sup> N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2013-O-11.

<sup>36</sup> N.D.C.C. § 44-04-19.1(9); N.D.A.G. 2013-O-11.

<sup>37</sup> N.D.A.G. 2013-O-11(citing N.D.A.G. 2004-O-24; N.D.A.G. 2000-O-09).

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This office has consistently explained that “introductory comments and explain[ing] the course of events that led to the options before the Board” were not negotiating strategy or instructions and were not properly made in an executive session.<sup>38</sup>

The January 13, 2021, executive session was recorded in compliance with N.D.C.C. § 44-04-19.2(5) and reviewed by this office.

The Board argues that the January 13, 2021, executive session was authorized by law to “discuss upcoming negotiating strategy with teachers” because one teacher’s resignation and the Hettinger Agriculture Education Advisory Board’s letter asking the Board to hire the teacher for a full-time Agriculture class, would affect its negotiating position.<sup>39</sup> It explains that “[t]he teachers had initiated the negotiation process,” and two issues had been brought to the Board regarding a teaching position and a program for which public discussion of those items would have had an adverse fiscal effect on the Board and its negotiating position in the upcoming teacher contract negotiations.<sup>40</sup> “At the time, there was no way to discuss planning on this position in light of . . . [the] pending resignation and the . . . [c]ommittee’s request without negatively affecting the District’s bargaining position in upcoming negotiations with all of the teachers. This executive session was *not* about [the teacher] individually.”<sup>41</sup> The Board argues that discussing one teacher’s two half-time positions would be a financial disadvantage if that discussion was held in public and that for small schools, “even a half-time program can have a large impact on how to move forward with negotiations.”<sup>42</sup>

The recording reveals that the executive session concerned a teacher who had recently resigned, and the Hettinger Agriculture Education Advisory Board

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<sup>38</sup> N.D.A.G. 2013-O-11, *See also* N.D.A.G. 2005-O-18, N.D.A.G. 2003-O-22, N.D.A.G. 2000-O-05.

<sup>39</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Att’y Gen.’s Office (Mar. 16, 2021). According to the Board’s executive session discussion, the Agricultural Education Advisory Board reviews curriculum and provides feedback for CTE courses and teachers. They do not represent or negotiate with teachers.

<sup>40</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Att’y Gen.’s Office (Mar. 16, 2021). “School district negotiations are timeline-specific (and have to get moving under the 30-day timeline), so once a school board or teachers initiate the negotiation process, the actual negotiations are absolutely likely to occur in the immediate future.”

<sup>41</sup> Letter from KrisAnn Norby-Jahner, Att’y at Law, to Att’y Gen.’s Office (Mar. 16, 2021).

<sup>42</sup> *Id.*

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Committee's request that the Board make the teacher one for a full-time class. No actual negotiation discussion took place. In fact, about fourteen minutes into the executive session the Board realized that it did not know who they were negotiating with and determined that they should find out.

At the time the executive session was held, it had already been publicly acknowledged that the Board would discuss going from a half-time to full-time Agriculture teaching position because it was listed on the meeting agenda. The decision to keep the current teaching positions was voted on in the open part of the meeting. The Board discussed far-ranging topics during the session that did not relate in anyway to negotiations that would cause an adverse fiscal effect on the Board's bargaining position.

Absent clear negotiation discussion, this discussion should have happened in an open meeting, if at all. It is my opinion that the executive session was not authorized because the Board failed to meet the three requirements to close the meeting for negotiation, the discussion during executive session was not limited to the announced topic, and collective agreements were reached during the executive session.

### CONCLUSIONS

1. The Board's January 13, 2021, regular meeting notice did not sufficiently describe the general subject matter to be discussed during an executive session and thus failed to substantially comply with the notice requirements of N.D.C.C. § 44-04-20(2).
2. The Board's announcement before entering the executive session was insufficient because it failed to convey a specific topic that would put the public on notice of what would be discussed during the executive session.
3. The Board violated N.D.C.C. § 44-04-19 when it talked about topics outside the announced topics and failed to meet the legal authority for an executive session.

### STEPS NEEDED TO REMEDY VIOLATION

The Board must revise the January 13, 2021, meeting notice and include a description of the executive session that provides the general subject matter of the executive session. The notice must be posted at the school district office for one week.

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The Board must amend its January 13, 2021, meeting minutes to reflect the discussions that occurred during the executive session. The board must provide the updated notice and minutes and either the recording or, at the requester's option, a transcript, of the executive session to Mr. Geiermann and anyone else requesting it, all at no cost.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2.<sup>43</sup> It may also result in personal liability for the person or persons responsible for the noncompliance.<sup>44</sup>

Wayne Stenehjem  
Attorney General

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cc: Michael J. Geiermann (via email only)

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<sup>43</sup> N.D.C.C. § 44-04-21.1(2).

<sup>44</sup> *Id.*